

512-384 Lockhart prefix are also routed to SWBT's Greenwood tandem. But instead of being forwarded to the Lockhart exchange, SWBT sends these calls from the Greenwood tandem directly to ASAP's Austin switch, without going through the Lockhart exchange.

Austin is not a part of the San Marcos - Lockhart ELCS area. Therefore, calls from San Marcos to Austin are toll calls, and apparently these toll calls are also routed through the SWBT Greenwood tandem. According to CenturyTel, ELCS calls and toll calls from San Marcos to the SWBT Greenwood tandem are carried on different trunks.

Between October 2001 and April 2002, CenturyTel handled calls from its San Marcos exchange to ASAP's Lockhart 512-384 prefix as a toll-free calls. However, beginning April 2, 2002, CenturyTel changed its switching codes and began to handle these calls as 1+ long-distance toll calls. In other words, since April 2, 2002, CenturyTel has charged a long-distance toll for calls from its San Marcos exchange to ASAP's Lockhart 512-384 prefix. As a result, ASAP brought this proceeding to compel CenturyTel to handle calls from San Marcos to the ASAP 512-384 NXX as toll free ELCS calls.

#### **B. ASAP's Arguments**

ASAP contends that CenturyTel must complete calls from San Marcos to ASAP's 512-384 Lockhart prefix as a toll-free ELCS call. It notes that telephone customers pay an ELCS fee each month to receive toll-free ELCS service and argues that CenturyTel is depriving these customers of their rights under the ELCS system. Further, ASAP states that the number of telephone calls to its San Marcos paging customers have dropped significantly since CenturyTel began charging a long-distance toll to telephone users calling ASAP's paging service. ASAP contends that CenturyTel's actions are causing ASAP's paging service to be less competitive and that it will force ASAP out of business. ASAP states that CenturyTel is trying to force ASAP to enter a reverse billing agreement, by which it would have to make payments to CenturyTel to eliminate the toll charges for callers to its paging service. ASAP argues that these payments would not be economically feasible

for it to continue its paging business in San Marcos.

ASAP points out that it is a telecommunications carrier and that under FCC rules CenturyTel must provide local "dialing parity" to ASAP. In other words, CenturyTel cannot require its users to dial ASAP's Lockhart number if no additional digits are required for other local calls. ASAP argues that CenturyTel is violating FCC rules by requiring its users to dial 1+ and pay long-distance tolls when they call ASAP's Lockhart NXX.

In response to CenturyTel's testimony that it is unable to complete the calls to ASAP's 512-384 prefix over ELCS trunks and must complete them over toll trunks, ASAP argues that it has no control over how CenturyTel routes its calls and that CenturyTel users should not be required to pay toll charges for an ELCS call due to CenturyTel's technical problems. ASAP claims it has provided all necessary information to CenturyTel and SWBT for them to route the calls as ELCS. Further, because the calls were completed without toll beginning in October 2001, ASAP states that it assumed there were no routing problems. ASAP also complains that CenturyTel cannot determine the rating of a call based on the routing that CenturyTel unilaterally chooses to use.

ASAP does not dispute that CMRS carriers can enter into "reverse billing" agreements with ILECs to make payments to the ILEC in order to "buy down" or eliminate tolls charged to callers. But ASAP argues there is no reason for it to buy down tolls because the calls from San Marcos to its 512-384 Lockhart prefix are supposed to be toll-free under the ELCS program. In other words, ASAP states, there are no legitimate tolls that it should have to buy down.

Finally, ASAP contends that it meets the requirements for emergency relief. It argues that it is likely to prevail on the merits, that CenturyTel's actions are anti-competitive and violate state and federal law, and that the public interest requires that end users not pay long distance tolls for ELCS service. ASAP also argues that CenturyTel's actions will effectively put ASAP out of business in the San Marcos area, and that ASAP's customers could potentially be at risk of harm because paging services are often used for emergency situations.

**C. CenturyTel's Arguments**

CenturyTel states that it has been unable to complete calls from San Marcos to ASAP's Lockhart prefix over ELCS trunks to SWBT's Greenwood switch. It states that a rapid busy signal occurs when these calls are attempted. As a result, CenturyTel states, it has been completing these calls since October 2001 over dedicated toll trunks. According to CenturyTel, it has not previously charged its customers a toll for these calls because CenturyTel thought, erroneously, that it had a reverse billing agreement in place with ASAP. But such a billing agreement does not exist, and ASAP is not willing to enter one. Therefore, CenturyTel argues that it is entitled to charge its end users a toll for these calls that can only be completed over toll trunks.

CenturyTel cites two FCC decisions. One holds that an ILEC can charge a CMRT for dedicated toll facilities used to connect the CMRT's NXX at a point outside of the ILEC's local calling area where the calls originate, *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, FCC File No. EB-00-MD-017 (Feb. 4, 2002); and the other holds that an ILEC may properly charge its end users for toll calls to a CMRT, *TRS Wireless, LLC v. US West Communications, Inc.*, FCC File No. E-98-13 (June 21, 2000).

CenturyTel's primary argument, however, is that ASAP has not met the requirements for emergency relief. It contends that ASAP has not shown that the requested relief is necessary to prevent or mitigate imminent harm, as required by PUC PROC. R. § 22.78(c), because ASAP has other options available that will prevent any harm or injury. In particular, CenturyTel states that ASAP could enter a reverse billing agreement, subject to refund pending the final outcome of this case. It also states that other paging providers utilize reverse billing at the same rate available to ASAP, so ASAP should not be at a competitive disadvantage. CenturyTel emphasizes that ASAP provided no evidence of rates charged by other paging companies, or how those rates would compare to ASAP's costs.

CenturyTel notes that under PUC PROC. R. § 22.242(h), the Commission may enter an order

requiring a utility "to continue to provide service during the processing of a complaint . . . for good cause, on such terms as may be reasonable to preserve the right of the parties during the processing of the complaint." In this case, CenturyTel argues, ASAP has shown no right to continue to use toll trunks during the processing of this complaint. CenturyTel states that the problem does not result from CenturyTel's refusal to provide ELCS service, but results from the fact that calls to ASAP's 512-384 number cannot be completed using ELCS trunks. Therefore, CenturyTel argues that ASAP's request for emergency relief should be denied.

#### **D. ALJ's Analysis**

Based on the evidence presented, the ALJ grants ASAP's request for emergency relief. P.U.C. PROC. R. § 22.122 provides that the presiding officer "shall issue interim orders covering . . . requests for interim relief, . . . as may aid in the . . . efficient and fair disposition of the proceeding." In addition, P.U.C. PROC. R. § 22.242 provides that the presiding officer may issue an order requiring a telecommunications utility to continue providing service during the processing of a complaint: "The presiding officer may issue such an order for good cause, on such terms as may be reasonable to preserve the rights of the parties during the processing of the complaint." Under these two rules, the ALJ required ASAP to prove that good cause exists and that emergency relief is necessary for a fair disposition of the case. To establish these requirements, the ALJ informed ASAP that it would be required to show a probable right to relief and that it is likely to suffer immediate or irreparable harm.<sup>5</sup>

The evidence at hearing established that the CenturyTel San Marcos exchange and the SWBT Lockhart exchange are located within a common ELCS service area. Under ELCS rules, calls between these two exchanges are treated as local calls. In return, the customers pay a monthly ELCS

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<sup>5</sup> A "probable right to relief" does not require ASAP to establish that it will ultimately prevail on the merits, and the hearing on ASAP's request for emergency relief was not a hearing on the merits of the entire case. Instead, ASAP was only required to establish that it has alleged a valid complaint and to present evidence that tends to support its complaint. See generally, *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593 (Tex. App. – Amarillo 1995, no writ) (discussing probable-right-to-relief standards for a temporary injunction).

fee to the ILECs.

ASAP's 512-384 NXX is assigned to the Lockhart exchange. Although the switch for this Lockhart NXX is located in Austin and apparently is not directly connected to the Lockhart exchange, CenturyTel did not contend at this hearing that the 512-384 NXX is not a valid Lockhart prefix for purposes of ELCS. Indeed, in its pleadings CenturyTel has stated that if it could complete these calls as ELCS calls, it would do so. Therefore, for purposes of this request for emergency relief, the ALJ concludes that CenturyTel's San Marcos customers are entitled to call ASAP's 512-384 prefix as a toll free ELCS call.<sup>4</sup> The ALJ further concludes that CenturyTel is improperly charging these customers a long-distance toll for these ELCS calls, that ASAP has shown a probable right to relief, and that granting ASAP's request for emergency interim relief will aid in the fair disposition of the case.

ASAP did not offer evidence of its rates or competitors' rates, nor did it precisely quantify the decrease in calls to its paging customers since CenturyTel began charging tolls for calls to ASAP's Lockhart prefix. But ASAP did offer testimony that requiring callers from San Marcos to pay a toll to call ASAP's paging service would seriously damage its ability to compete for paging customers. And ASAP's contention is supported by common sense.

CenturyTel suggests that ASAP could eliminate the tolls by entering into a reverse billing or buy-down agreement with CenturyTel. But the ALJ concludes that ASAP should not be required to incur additional expense to enable CenturyTel's customers to make ELCS calls for which CenturyTel is already receiving compensation in the form of monthly ELCS fees. Further, P.U.C. PROC.R. § 22.242 provides that the presiding officer can enter an interim order "to preserve the rights

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<sup>4</sup> As noted, the hearing on emergency relief is not a final hearing on the merits. In its list of possible issues to the Commission, CenturyTel included the following two issues: "Is ASAP's assignment of prefixes that actually reside at its Austin switch to certain distant exchanges proper?"; "Even if ASP's prefixes are lawfully assigned to the exchange as shown in the LERG, are paging calls to these numbers properly treated as ELCS calls, given ASAP's network configuration?" Nothing in this order granting emergency relief should be considered as a decision or recommendation on those two issues, as they were not addressed at the hearing on emergency relief.

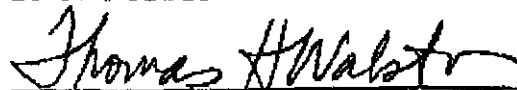
of the parties during the processing of the complaint." At this point, the ALJ has concluded that ASAP has a right to receive calls from CenturyTel's San Marcos exchange as toll free ELCS calls. To now require ASAP to pay a fee to continue this service would not preserve the rights of ASAP, but would instead impose a new burden. Therefore, the ALJ concludes that ASAP has shown that it will sustain immediate damage as a result of CenturyTel's actions, and that granting interim relief is necessary to preserve the rights of the parties during the processing of this complaint.

Finally, the ALJ concludes that the two FCC cases cited by CenturyTel are distinguishable. In both of those cases, the calls in dispute were legitimate toll calls. Under those facts, the FCC concluded that the ILEC could charge the callers a toll or require the CMRS to enter into a reverse-billing agreement to buy down the tolls. But in the present case, the calls in question are toll-free ELCS calls. Under these circumstances, CenturyTel cannot impose a toll on the callers, nor can it require ASAP to buy down the tolls that would be charged in the absence of ELCS.

Therefore, for the reasons stated, the ALJ grants ASAP's request for interim emergency relief.

SIGNED AT AUSTIN, TEXAS, April 18, 2002.

STATE OFFICE OF ADMINISTRATIVE HEARINGS



THOMAS H. WALSTON  
ADMINISTRATIVE LAW JUDGE

**ASAP Paging, Inc. Petition for Preemption of TPUC**

**Exhibit 5: Proposal For Decision**



Control Number: 25673



Item Number: 141

Addendum StartPage: 1



# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

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April 23, 2003

TO: Stephen Journeay, Director  
Office of Policy Development  
William B. Travis State Office Building  
1701 N. Congress, 7th Floor  
Austin, Texas 78701

RE: SOAH Docket No. 473-02-2503  
PUC Docket No. 25673

*Complaint, Request for Expedited Ruling, Request for Interim Ruling, and Request for  
Emergency Action of ASAP Paging, Inc. Against Centurytel of San Marcos, Inc.*

Enclosed are two copies of the Proposal for Decision (PFD), in the above-referenced case. Please file-stamp and return a copy to the State Office of Administrative Hearings for our records. Also enclosed is a disk containing an electronic copy of the PFD. By copy of this letter, the parties to this proceeding are being served with the PFD.

Please place this case on an open meeting agenda for the Commissioners' consideration. There is no jurisdictional deadline. It is my understanding that you will be notifying me and the parties of the open meeting date, as well as the deadlines for filing exceptions to the PFD, replies to the exceptions, and requests for oral argument.

Sincerely,

Thomas H. Walston  
Administrative Law Judge

Enclosure

xc: All Parties of Record (without disk)

001

141

**SOAH DOCKET NO. 473-02-2503  
PUC DOCKET NO. 25673**

|                                     |          |                                |
|-------------------------------------|----------|--------------------------------|
| <b>COMPLAINT, REQUEST FOR</b>       | <b>§</b> | <b>BEFORE THE STATE OFFICE</b> |
| <b>EXPEDITED RULING, REQUEST</b>    | <b>§</b> |                                |
| <b>FOR INTERIM RULING, AND</b>      | <b>§</b> |                                |
| <b>REQUEST FOR EMERGENCY ACTION</b> | <b>§</b> | <b>OF</b>                      |
| <b>OF ASAP PAGING, INC.</b>         | <b>§</b> |                                |
| <b>AGAINST CENTURYTEL OF</b>        | <b>§</b> |                                |
| <b>SAN MARCOS, INC.</b>             | <b>§</b> | <b>ADMINISTRATIVE HEARINGS</b> |

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**SOAH DOCKET NO. 473-02-2503  
PUC DOCKET NO. 25673**

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| <b>COMPLAINT, REQUEST FOR<br/>EXPEDITED RULING, REQUEST<br/>FOR INTERIM RULING, AND<br/>REQUEST FOR EMERGENCY ACTION<br/>OF ASAP PAGING, INC.<br/>AGAINST CENTURYTEL OF<br/>SAN MARCOS, INC.</b> | <b>§<br/>§<br/>§<br/>§<br/>§<br/>§<br/>§</b> | <b>BEFORE THE STATE OFFICE<br/><br/><br/>OF<br/><br/>ADMINISTRATIVE HEARINGS</b> |
|--|--|--|

**PROPOSAL FOR DECISION**

**I. Introduction**

ASAP Paging, Inc. (ASAP) is an FCC-licensed<sup>1</sup> Commercial Mobile Radio Service (CMRS) provider that provides wireless paging services to the general public, and wireline connections to the Public Switched Telephone Network (PSTN) for certain Internet Service Providers (ISPs). ASAP alleges that CenturyTel of San Marcos, Inc. (CenturyTel) improperly charged CenturyTel's San Marcos customers long-distance toll for calls to ASAP's paging and ISP customers, and that these calls should have been rated as toll-free local calls under Extended Local Calling Service (ELCS). ASAP complains that these toll charges discourage CenturyTel customers from calling ASAP's customers, thus hurting ASAP's business.<sup>2</sup> In response, CenturyTel contends that it is entitled to charge toll because the calls do not qualify for ELCS and are properly rated as intra-LATA long distance.<sup>3</sup> The ALJ finds that calls from CenturyTel's customers in San Marcos to ASAP's paging and ISP customers do not qualify for ELCS and that CenturyTel did not improperly charge long-distance toll.

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<sup>1</sup> FCC stands for the Federal Communications Commission.

<sup>2</sup> An interim order was entered on April 18, 2002, requiring CenturyTel to cease the toll charges until a final resolution of this case. Therefore, CenturyTel is not charging the disputed tolls at this time. See, Order No. 3, Granting ASAP Inc.'s Request for Emergency Action (Apr. 18, 2002).

<sup>3</sup> LATA stands for Local Access and Transport Area, which is defined as: "A geographic area established for the provision and administration of communication services. It encompasses one or more designated exchanges, which are grouped to serve common social, economic, and other purposes." P.U.C. SUBST. R. 26.5(116).

A second issue is whether ASAP is subject to regulation by the Public Utility Commission of Texas (PUC or Commission) for the services it provides to ISPs. CMRS providers, such as ASAP, are normally regulated exclusively by the FCC. However, in addition to its wireless paging services, ASAP also provides a wireline connection to the PSTN for certain ISPs. As a result, the Commission has asked whether ASAP is providing a non-CMRS service that would subject it to regulation by the Commission. The ALJ finds that ASAP's wireline service to ISPs is not CMRS or incidental to CMRS; therefore, ASAP must register with the Commission under PURA<sup>4</sup> § 52.103 and P.U.C. SUBST. R. 26.107.

## **II. Summary of Findings and Recommendations**

The Commission's Preliminary Order contained seven issues.<sup>5</sup> The ALJ's findings and recommendations concerning these Preliminary Order issues are as follows:

### **Issue No. 1**

**Was ASAP in violation of certification and/or registration requirements pursuant to PURA and/or the Commission's substantive rules when it provided service to San Marcos Internet in the manner described in the complaints?**

ASAP is not in violation of the certification requirements contained in PURA § 54.001, but ASAP is required to register with the Commission under PURA § 52.103 and P.U.C. SUBST. R. 26.107 for the services it provides to ISPs.

#### **(1) Is the service "incidental" to ASAP's CMRS authority?**

No, ASAP's service to its ISP customers is not "incidental" to ASAP's CMRS authority because it is not provided to ASAP's

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<sup>4</sup> Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.001-64.158 (Vernon 1998 & Supp. 2003) (PURA).

<sup>5</sup> The parties raised additional issues at the hearing and in their briefs dealing primarily with carrier interconnection agreements and intercarrier compensation. Some of these are currently pending at the FCC, but a decision on these issues is not necessary to resolve this case. Therefore, this Proposal for Decision (PFD) does not discuss those issues. See, ASAP Initial Brief at 36 (Commission should forebear ruling on other issues pending action in FCC Docket 01-92).

CMRS paging customers and it is not directly related or supplemental to ASAP's CMRS paging services.

**(2) Is the service jurisdictionally interstate?**

ASAP's service to ISPs is an intrastate component of a jurisdictionally "mixed" telecommunications / information service that utilizes both intrastate and interstate services and facilities. Under these circumstances, the Commission may regulate the intrastate portion of the service so long as it does not thwart or impede a valid federal policy related to the interstate portion of the telecommunication.

**(3) To the extent the service is intrastate, is it "basic local telecommunications service" as defined in PURA § 51.002(1)?**

No, the service is not "basic local telecommunications service" as defined in PURA § 51.002(1) because it does not include the types of services specified in that section of PURA.

**(4) To the extent the service is intrastate, is it "local exchange telephone service" as defined in PURA § 51.002(5)?**

No, ASAP's service to ISPs is not "local exchange telephone service" as defined in PURA § 51.002(5) because ASAP does not provide the type of services that comprise local exchange telephone service.

**(5) To the extent the service is intrastate, is it "switched access service" as used in PURA § 54.001?**

No, the service is not "switched access service" as used in PURA § 54.001 because it does not provide ASAP's ISP customers a connection to a long-distance service provider.

**(6) Does ASAP provide any service that requires it to register as a nondominant carrier under PURA § 52.103?**

Yes, ASAP's non-CMRS service to ISPs includes conveying a communication partly over a telephone system, which qualifies ASAP as a "telecommunications utility" that must register with the Commission under PURA § 52.103. ASAP's FCC CMRS license

does not exempt ASAP from registering with the Commission for ASAP's non-CMRS services and requiring ASAP to register with the Commission for its non-CMRS service will not thwart or impede any valid federal policy.

**Issue No. 2**

**To the extent ASAP is a CMRS provider for paging services, are calls from CenturyTel customers in San Marcos to ASAP paging customers with a 512-384 paging number eligible for ELCS?**

No. ELCS is a toll-free calling service *between exchanges* that meets geographic proximity and community-of-interest requirements. But calls from CenturyTel customers in San Marcos to ASAP customers with a 512-384 central office code (NXX) have no geographical correlation with an ELCS exchange. Therefore, such calls do not qualify for ELCS.

- (1) **May ASAP designate the calling path the traffic takes before termination?**

No, ASAP may not designate the calling path that the traffic takes before termination. However, ASAP has not expressly "designated a calling path" in this case. Instead, it has only designated a single point of interconnection (POI) within the LATA, and the ILECs<sup>6</sup> can route to this POI as they choose.

- (2) **If ASAP does designate the path, does the manner in which it designates the calling path impact the ELCS eligibility of the traffic?**

ASAP has not expressly designated a calling path for its traffic. Further, the fact that CenturyTel and SWBT route the traffic over trunks they have designated as "toll trunks" does not impact the ELCS eligibility of the traffic.

- (3) **Is CenturyTel in violation of the Commission's order in Project No. 13267, which established ELCS between Lockhart and San Marcos?**

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<sup>6</sup> ILEC stands for "incumbent local exchange carrier."



No, CenturyTel is not in violation of the Commission's ELCS order in Project No. 13267. It has made the interconnections required by that order and calls from San Marcos to ASAP's NXXs do not qualify for ELCS.

**(4) Is CenturyTel in violation of its Texas General Exchange tariff?**

No, CenturyTel is not in violation of its Texas General Exchange tariff. The tariff refers to calls between San Marcos and the Lockhart, Kyle, and Fentress exchanges, but calls to ASAP's NXXs do not terminate within these exchanges.

**Issue No. 3**

**Did CenturyTel properly switch the trunking arrangement from ELCS to intraLATA toll?**

CenturyTel did not actually "switch trunking arrangements." CenturyTel and SWBT<sup>7</sup> have always used the same trunk to route traffic to ASAP's switch. Instead, CenturyTel changed the translations in its switch to require 1+ or 0+ dialing. But because the calls do not qualify for ELCS, CenturyTel did not act improperly in changing the translations in its switch.

**Issue No. 4**

**Is CenturyTel being charged for the use of that trunk? If so, by whom and at what rate?**

No, CenturyTel is not being charged for use of the trunk.

**Issue No. 5**

**Whose responsibility is it to complete the ELCS call?**

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<sup>7</sup> Southwestern Bell Telephone Company, now known as SBC Texas.

The incumbent exchange carriers, CenturyTel, SWBT, and Verizon,<sup>8</sup> are responsible for completing ELCS calls *to exchanges that are within the approved ELCS territory*. However, calls to ASAP's NXXs are not ELCS, and ASAP is responsible for completing calls to its switch.

**Issue No. 6**

**Are CenturyTel's actions anticompetitive in violation of PURA § 52.108(3)?**

No, CenturyTel's actions are not anticompetitive in violation of PURA § 52.108(3).

**Issue No. 7**

**Is CenturyTel in violation of the equal access dialing parity provisions in PURA § 55.009(c) and/or P.U.C. SUBST. R. § 26.275?**

No, CenturyTel is not in violation of the equal access dialing parity provisions in PURA § 55.009(c) and/or P.U.C. SUBST. R. § 26.275.

**III. Jurisdiction and Procedural History**

The Commission has jurisdiction over this matter pursuant to PURA §§ 14.001, 52.003, and 53.001. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the conduct of this proceeding pursuant to TEX. GOV'T CODE ANN. § 2003.049 (Vernon 2002).

The procedural history of this proceeding is as follows:

|               |  |
|---------------|--|
| April 2, 2002 | ASAP and San Marcos Internet, Inc. filed a complaint and request for expedited ruling to resolve various disputes with CenturyTel. |
| April 5, 2002 | ASAP and San Marcos Internet filed an amended complaint to correct factual errors and to remove San Marcos Internet as a party.    |
| April 9, 2002 | PUC Policy Development Division referred this matter to SOAH for   |

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<sup>8</sup> CenturyTel is the ILEC for the San Marcos exchange; SWBT for the Lockhart exchange, and Verizon Southwest, Inc. (Verizon), for the Kyle and Fentress exchanges.

|   |  |
|---|--|
|   | a contested case hearing and a proposal for decision, if necessary.  |
| April 15, 2002                            | SOAH ALJ Thomas H. Walston held a preliminary hearing to consider ASAP's request for interim ruling and emergency action.  |
| April 18, 2002                            | ALJ Walston entered Order No. 3, granting ASAP's request for interim ruling and emergency action and requiring CenturyTel not to assess toll charges for calls made to ASAP's 512-384 NXX. |
| May 8, 2002                               | The Commission issued its Preliminary Order outlining the issues to be addressed.  |
| October 10-11 and<br>November 12-13, 2002 | Hearing on the merits.   |
| January 21, 2003                          | Parties filed their initial post-hearing briefs.   |
| February 18, 2003                         | Parties filed their reply briefs and the record closed.  |

#### IV. Discussion

##### A. Overview

This case involves a collision between the Commission's rules governing ELCS and ASAP's association of central office codes (NXXs) with the Lockhart, Kyle, and Fentress ELCS exchanges, where ASAP does not have an end office, switch, or other telephone facility. Instead, ASAP has a telecommunications switch located in Austin that is physically connected to SWBT's tandem switches in Austin.<sup>9</sup> ASAP's switch is physically connected to ASAP's paging terminal at the same location, and ASAP's paging terminal broadcasts via the wireless spectrum to a number of paging transmitters located throughout central Texas and beyond.<sup>10</sup> When a page is received at ASAP's Austin switch, ASAP's Austin paging terminal sends a signal to all of ASAP's paging transmitters

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<sup>9</sup> Hearing on Interim Ruling and Request for Emergency Action, (Apr. 15, 2002), Tr. 12, (Int. Hrg. Tr.).

<sup>10</sup> *Id.* at 112-113.

throughout its wireless service area simultaneously.<sup>11</sup> The paged customer can receive the page if he/she is located within the range of any of these transmitters. For example, a customer having a Kyle number, but who is physically located in Bryan, may receive a page dialed to his Kyle number and transmitted to him from ASAP's paging transmitter in Bryan. In addition, ASAP provides telephone numbers using the NXXs in dispute and a connection to the PSTN to a select few ISPs that are either collocated within the building housing ASAP's switch in Austin or that have transport facilities there to receive traffic from ASAP's switch.<sup>12</sup>

ASAP's point of interconnection (POI) in the LATA is its connection to the SWBT Greenwood tandem switch located in Austin.<sup>13</sup> ASAP does not appear to have established any other POIs within the Austin LATA with any other ILEC or at any location other than Austin, although ASAP contends that the SWBT-CenturyTel meet point in San Marcos serves as a surrogate POI for ASAP.

At issue in this proceeding are three NPA-NXX codes that ASAP has "associated" in the Local Exchange Routing Guide (LERG) with the following exchanges: 512/265-Fentress, 512/384-Lockhart, and 512/580-Kyle.<sup>14</sup> Before obtaining these NXXs, ASAP also established an area-wide calling plan with SWBT and CenturyTel for its 512/222-NXX. Under this arrangement, ASAP pays compensation to these ILECs to allow callers in a wide central Texas area to call ASAP's paging customers without incurring a toll. Most of ASAP's paging customers use the 512/222 numbers, while the Lockhart, Kyle, and Fentress NXXs are assigned predominately to ISPs. None of ASAP's ISP customers use numbers from the 512-222 wide-area calling plan because the

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<sup>11</sup> *Id.* at 114-115.

<sup>12</sup> *Id.* at 105; CenturyTel (CT) Ex. 3A; Ex. WR 2-B, "Telephone Number Resale Agreement."

<sup>13</sup> *Id.* at 106-107.

<sup>14</sup> ASAP Ex. 9, Direct Testimony of Ted Gaetjen at 7-8 (Gaetjen Direct).

per-minute charges under that plan would be cost prohibitive to handle lengthy calls made for access to the Internet.<sup>15</sup>

ASAP contends that calls from CenturyTel customers in the San Marcos exchange to the 265-, 384-, and 580-NXXs should be retail rated as ELCS calls because the Fentress, Lockhart, and Kyle exchanges are ELCS to San Marcos. ASAP argues that retail rating for calls to these NXXs as local or long-distance should be based on the exchange with which the NXX is associated in the LERG, which would make the calls eligible for local rating under ELCS, regardless of the location where a call to these NXXs actually terminates.

In response, CenturyTel argues that calls ASAP's paging customers should be rated based on the location of the called party. But because these pages are broadcast to a wide area beyond the ELCS territory and because the location where a paging customer receives a page cannot be determined, CenturyTel argues that the location of ASAP's switch and terminal in Austin should be used as a proxy for the location of the paging customer.<sup>16</sup> And since calls from San Marcos to Austin are retail rated as long-distance, CenturyTel argues that it properly rated calls to paging customers using the NXXs at issue as intraLATA long distance.<sup>17</sup>

When a CenturyTel San Marcos customer calls an ISP served by ASAP's Austin switch, the caller establishes a landline-to-landline (LTL) connection to the ISP.<sup>18</sup> CenturyTel's network connects to SWBT's network at their meet point on Wonder World Drive in San Marcos; SWBT

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<sup>15</sup> Hearing on the Merits Transcript (Tr.) at 46-47.

<sup>16</sup> Tr. at 36 (calls come into ASAP at its Austin paging terminal and the paging signal is sent to transmitters located in various areas of the state or to a satellite); Tr. at 31 (calls are not received at the paging transmitters).

<sup>17</sup> CenturyTel characterizes ASAP's Kyle, Fentress, and Lockhart NPA-NXXs as "virtual NXXs" because ASAP assigns telephone numbers from these NXX codes to customers who are not physically located within the Kyle, Fentress, or Lockhart exchanges. Int. Hrg. Tr. at 118-119.

<sup>18</sup> Int. Hrg. Tr. 118; Tr. at 56-57.

carries the call via landline trunk facilities to SWBT's Greenwood tandem switch; SWBT's tandem hands off the call to landline interconnection trunks for delivery to ASAP's switch; and then ASAP routes the call over landline connections to its ISP customer, who is either collocated at ASAP's switching premises in Austin or has obtained landline transport facilities to receive traffic at ASAP's location. Calls to ASAP's ISP customers are never routed through or use any federally licensed CMRS wireless spectrum or mobile station.<sup>19</sup> ASAP negotiates with these ISPs individually, and these services are not offered to the public at large, or even a large number of ISP customers.<sup>20</sup>

It is not clear from the record exactly when ASAP began service to these NXXs, but ASAP obtained the Lockhart 384-NXX from the North American Numbering Plan Administrator (NANPA) in December 1999. From October 2001 until April 1, 2002, CenturyTel delivered calls from San Marcos to these NXXs toll-free. However, beginning April 2, 2002, CenturyTel changed its switch translations so that callers from San Marcos had to dial 1+ or 0+ to call ASAP's NXXs, and CenturyTel began charging toll for such calls. That action caused ASAP to file this complaint. After a preliminary hearing, the ALJ entered an interim order on April 18, 2002, requiring CenturyTel to cease requiring 1+ or 0+ dialing to call these NXXs and to cease charging toll for such calls until a final ruling in this case.

Based on the evidence presented at hearing, the ALJ finds that calls from San Marcos to ASAP's paging and ISP customers using NXXs associated with Lockhart, Kyle, and Fentress are not eligible for ELCS, and that CenturyTel may charge intraLATA toll for such calls. The ALJ also finds that the service ASAP provides to ISPs is not CMRS or incidental to CMRS and that ASAP must register with the Commission in connection with this service.

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<sup>19</sup> *Id.* at 105.

<sup>20</sup> ASAP Ex. 9 (Gaetjen Direct) at 11.

**B. Contested Issues**

**1. Preliminary Order Issue No. 1**

**Was ASAP in violation of certification and/or registration requirements pursuant to PURA and/or the commission's substantive rules when it provided service to San Marcos Internet in the manner described in the complaints?**

- (1) Is the service "incidental" to ASAP's CMRS authority?**
- (2) Is the service jurisdictionally interstate?**
- (3) To the extent the service is intrastate, is it "basic local telecommunications service" as defined in PURA § 51.002(1)?**
- (4) To the extent the service is intrastate, is it "local exchange telephone service" as defined in PURA § 51.002(5)?**
- (5) To the extent the service is intrastate, is it "switched access service" as used in PURA § 54.001?**
- (6) Does ASAP provide any service that requires it to register as a nondominant carrier under PURA § 52.103?**

**a. Introduction**

ASAP has assigned some of its Lockhart 384 NXX-numbers to certain unnamed ISPs. ASAP provides a connection to the PSTN for these ISPs at ASAP's switch in Austin. ASAP makes this connection by landline, without the use of ASAP's paging terminal or the wireless spectrum. As a result, the Commission has asked whether this arrangement is a non-CMRS service, and whether it requires ASAP to register with or obtain a certificate from the Commission. ASAP argues that the service it provides to ISPs is not subject to state certification or registration requirements because: (1) ASAP is an FCC-regulated CMRS carrier; (2) the service is incidental to FCC-regulated CMRS service; (3) the service is *interstate* information access service exempt from state regulation; and/or (4) the service is not local exchange service or switched access service that requires certification. CenturyTel disagrees and argues that ASAP must either register with or obtain a certificate from the Commission. Commission Staff took no position on this issue.

b. Discussion

(1) Subissue 1: Is ASAP's ISP service "incidental" to ASAP's CMRS authority?

(a) Parties' Arguments

ASAP argues that, as a licensed CMRS carrier, it has express authority under 47 C.F.R. § 22.323<sup>21</sup> to provide "incidental" communications services and that such incidental services should be treated as CMRS, exempt from state regulation.<sup>22</sup> ASAP contends that its service to ISPs should be considered incidental to CMRS because its CMRS service is closely intertwined with the Internet.<sup>23</sup> For example, ASAP uses the Internet to connect with a satellite service that sends signals to its transmitters,<sup>24</sup> and a paging customer can receive text messages initiated from a web page or

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<sup>21</sup> [47 C.F.R.] Sec. 22.323 Incidental communication services.

Carriers authorized to operate stations in the Public Mobile radio services may use these stations to provide other communications services incidental to the primary public mobile service for which the authorizations were issued, provided that:

(a) The costs and charges of subscribers who do not wish to use incidental services are not increased as a result of provision of incidental services to other subscribers;

(b) The quality of the primary public mobile service does not materially deteriorate as a result of provision of incidental services, and neither growth nor availability of the primary public mobile service is significantly diminished as a result of provision of incidental services; and

(c) The provision of the incidental services is not inconsistent with the Communications Act of 1934, as amended, or with FCC rules and policies.

<sup>22</sup> ASAP cites § 332(c)(3) of the federal Act, which expressly pre-empts state entry/exit and rate regulation for CMRS. Section 332(c)(3) provides:

STATE PREEMPTION – (A) Notwithstanding sections 2(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. . . .

<sup>23</sup> ASAP Exh. 44 (Gaetjen Reb.) at 15.

<sup>24</sup> Tr. 25-26, 56.



email.<sup>25</sup> To accomplish this, ASAP must use ISPs to connect to the Internet.<sup>26</sup> Therefore, ASAP states that its service to ISPs is incidental to its CMRS authority because it is directly related to the other CMRS-related services that ASAP provides.

ASAP rejects CenturyTel's argument that a service must use wireless spectrum with every call in order to be considered "incidental" to CMRS. ASAP contends that CenturyTel has agreed that paging companies can provide voice messaging service as an incidental service. But when a paging customer calls to retrieve such a message, there is no use of spectrum.<sup>27</sup> Instead, the paging customer calls the proper number and retrieves the voice message and no wireless transmission occurs. Thus, ASAP argues that this example of a common, incidental service shows that CenturyTel's proposed use-of-the-spectrum test is flawed.

Finally, ASAP states that the Commission has expressly ruled that CMRS providers are not required to obtain a certificate before they provide the functional equivalent of local service.<sup>28</sup> In the *Western Wireless* case, the Commission required Western Wireless to provide at least 14.4 kbps transmission over its wireless links so that its customers could connect to the Internet, as a condition to receiving universal service support.<sup>29</sup> Thus, ASAP states, Western Wireless had to somehow provide a connection to ISPs so that its fixed wireless users could access the Internet. It also suggests that there is no express restriction in the *Western Wireless* case enjoining Western Wireless from directly providing connectivity to ISPs, and there is no express restriction in the FCC incidental

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<sup>25</sup> Int. Hng. Tr. 98.

<sup>26</sup> Tr. 25-26, 56, 652-53.

<sup>27</sup> Tr. 41; ASAP Exh. 44 (Gaetjen Reb.) at 14, note 21.

<sup>28</sup> *Application of WWC Texas RSA Limited Partnership for Designation as an Eligible Telecommunications Carrier Pursuant to 47 U.S.C. § 214(c) and P.U.C. Subst. R. § 26.148*, PUC Docket No. 22289, Prelim. Order at 8-9 (*Western Wireless*).

<sup>29</sup> Tr. 654.